Ontario

DUTIES AND POWERS OF A GUARDIAN OF PROPERTY

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Duties and Powers of a Guardian of Property
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DUTIES AND POWERS OF A GUARDIAN OF PROPERTY

The purpose of this information bulletin is to help a person who has been appointed as the guardian of property of an incapable person. It explains what this important role involves, what things the guardian is allowed to do and what steps must be taken by the guardian to meet his or her obligations to the incapable person.

This information bulletin may also be useful to other people who are not guardians. For example, if you are considering applying to be the guardian of a relative or friend who is incapable, you should be fully aware of what the role involves. If you are a person working with a guardian of property, you may want to know what the guardian is allowed to do and what you can expect in your dealings with the guardian.

The powers and duties of a guardian of property are set by law. The Substitute Decisions Act, 1992 and the regulations under that law set out these powers and duties. This bulletin is a summary, based on the law. It is not as comprehensive as the law itself. This bulletin is not legal advice. If, after reading this information bulletin, you have more questions or uncertain about how to interpret the information, you should consult with a lawyer.

The Purpose of a Guardian of Property

People who are mentally incapable of handling their own finances are unable to look after their own welfare by looking after the basic financial transactions that adults normally carry out for themselves. They are unable to do their own banking, look after day-to-day bills, buy personal items, buy food, shelter and services, collect payments to which they are entitled or deal with assets they own such as a house or investments. This makes them extremely vulnerable. It also affects other people such as dependants, service providers and those who own property together with the incapable person. The role of a guardian of property is to step into the shoes of the incapable person for the purpose of financial decisions and transactions on that person's behalf. This serves to protect the welfare of the incapable person. It also indirectly benefits others whose own financial interests are connected to those of the incapable person.

This obligation is a very serious one. Almost every aspect of the incapable person's life is affected - directly or indirectly - by the guardian's actions. By performing the role diligently and sensitively, the guardian will give the incapable person the most comfortable, enjoyable and safe life that the incapable person can afford. On the other hand, extreme harm can result to the incapable person and to others if the guardian does not act diligently and honestly. Therefore, the highest standards of honesty, integrity and trust are demanded from the guardian.

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Passing control of an incapable person's income and assets to a guardian of property does not mean that the guardian assumes ownership of the income and assets. Ownership remains in the name of the incapable person. Similarly, the guardian does not become personally liable for any of the incapable person's financial obligations. He or she is simply responsible for managing, in the best way possible, what the incapable person has.

Authority of a Guardian

As a guardian of property, you are allowed to do on the incapable person's behalf anything in relation to his or her property that the person could do if capable, except to make a will. For example, you are allowed to do the following on the incapable person's behalf:

- open and close bank accounts
- redirect pensions and other income
- apply for benefits or supplementary income to which the person is entitled
- choose pension options
- deal with investments
- collect debts
- pay bills
- buy goods and services
- start or defend law suits, if there are financial implications
- lend, sell, store or dispose of personal belongings
- maintain or sell a house or vehicle

You are entitled to receive, from any person or business, information about the property that belongs to the incapable person and copies of any documents signed by, or given to, the incapable person.

A person who holds, or controls the property is required by law to deliver the property to you when you require that person to do so. This situation will arise if you need control of the property for a decision that you make in the best interests of the incapable person. For example, you may need to obtain the contents of the incapable person's safety deposit box to look for valuable papers like savings bonds or guaranteed investment certificates. You are entitled to obtain the person's will, if they have one. You should always do so.

Legal Responsibilities of a Guardian

- You must keep the incapable person's financial accounts and transactions completely separate from your own. You must never borrow or use the incapable person's money for yourself or your family and friends unless authorized in the management plan or by the court (see below). You are only allowed a specific amount to compensate you for your work as a guardian (see the section on Compensation below).

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- You must consider the personal comfort or well-being of the incapable person in determining whether any financial decision or transaction is for the incapable person's benefit. The most important goal in performing your role is to maximize the quality of life of the incapable person.

- You must manage the property in a way that accommodates the decisions made about the incapable person's personal care. For example, if the person wants to live in a certain place and can afford it, it would be your duty to arrange to pay for this choice of residence. If the person wants to take a vacation and can afford it, it would be your duty to make arrangements to pay for it. However, there is one exception to this obligation. You may make a financial decision that overrides a personal care decision **only if** to do otherwise would result in negative consequences with respect to property that **heavily outweigh** the personal care benefits of the decision. For example, the person may want to remain living in his or her own house, but may require 24 hour care and not have enough money to pay for it without selling the house and moving to another residence. In that case, the need to sell the house in order to have enough money to pay for the person's care may heavily outweigh the person's wish to remain living in the house.

- It is your responsibility to try to inform the incapable person of all your powers and duties, to the extent that the person is able to understand.

- As the guardian of property you must encourage the incapable person to participate, to the best of his or her abilities, in your decisions about the property.

- You must consult from time to time, with family members and friends who are in regular contact with the incapable person and with people providing personal care (for example, nurses, doctors, support workers) to the incapable person. You must also foster personal contact between family members, caregivers, and the incapable person.

- You must act in accordance with the management plan established for the property. The management plan is the document outlining the details of the property that you submitted to the Public Guardian and Trustee or the court with your application for guardianship. This plan may be amended from time to time, with the Public Guardian and Trustee's approval.

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- You must make reasonable efforts to determine whether the incapable person has a will, and if so what the will says. If the incapable person's will includes a gift of property, you must retain that property so that it may be passed on in accordance with the incapable person's will. You may need to depart from this rule if selling the property is absolutely necessary for you to fulfil your duties to the incapable person while he or she is alive.

Required Expenditures by a Guardian

As the guardian, you are required to make certain expenditures from the incapable person's property, provided there is enough money, in the following order:

1. Expenditures that are necessary, within reason, for the support and care of the incapable person.

2. If enough money remains, expenditures for the maintenance and education of the incapable person's dependants.

3. If enough money remains, expenditures that are necessary to meet the incapable person's other legal obligations.

Discretionary Expenditures

In addition to the required expenditures listed above, you **may** make the following expenditures:

- Gifts or loans to the incapable person's friends and relatives if the incapable person previously (before becoming incapable) indicated that he or she would make these gifts or loans.

- Charitable gifts, if the incapable person previously made similar gifts or authorized these gifts in a power of attorney before becoming incapable. These gifts shall not exceed the lesser of

  - 20% of the incapable person's income in the year the gift is made; or
  - the maximum amount or value of gifts provided for in a power of attorney previously signed by the incapable person before becoming incapable

BUT

- If the incapable person indicates to you that he or she does not want to make gifts or loans, you must follow the person's wishes. You must not make a gift or loan to friends or family or make a charitable donation that is contrary to the expressed wishes of the incapable person.

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Directions from Court

If any difficult questions about the management of the property arise, you may apply to the court for directions on how to resolve the issue. The court you apply to will be the Superior Court of Justice (formerly known as the Ontario Court, General Division). The court will give you directions as to what it considers to be beneficial to the incapable person. You will probably require the services of a lawyer to bring your application to court.

Compensation

As a guardian of property, you may be paid for your work. The annual compensation that you are allowed to take is set out in a fee scale in Ontario Regulation 159/00 that is outlined below. This scale determines the amount of compensation you may take and the method you shall use to calculate that amount. You may take more compensation than the amount prescribed by the fee scale if you receive written consent from the Public Guardian and Trustee AND the incapable person's guardian of the person or attorney under a power of attorney for personal care, if he or she has one. You should speak with a lawyer or an accountant to receive advice on how to calculate these fees.

Fee Scale:

As a guardian of property, effective April 1, 2000 for all **new** transactions, you are entitled to compensation of:

- 3% on capital and income received by you;
- 3% on capital and income disbursements; and
- 3/5ths of 1% of the annual average value of the assets (this is called the care and management fee).

Note that for transactions prior to April 1, 2000 fees were 2.5% on capital and income received by you and on capital and income disbursements, and 2/5 of 1% of the annual average value of the assets

Capital received by you includes the incapable person's property that you locate, secure and manage for the incapable person such as real estate, bank accounts and guaranteed investment certificates.

Income received by you on behalf of the incapable person may include pensions, government benefits, dividends, interest and rent.

A capital disbursement on behalf of an incapable person may include buying an asset on his or her behalf, such as buying a house or investing in Canada Savings Bonds.

An income disbursement on behalf of an incapable person is a payment made on behalf of the person, for items such as rent, utilities, food, clothing or housekeeping services.

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Maintaining and Passing Accounts

As the guardian of property, one of your main legal duties is to keep accounts of all transactions involving the property. You may be required to pass (submit) your accounts to the court for inspection in several circumstances. The Public Guardian and Trustee may apply to the court for an order requiring you to pass your accounts. As well, the incapable person, the incapable person's guardian or attorney for personal care, any of the incapable person's dependants, the Children's Lawyer, a creditor of the incapable person or anybody else, with the court's permission, may apply to the court for an order requiring you to pass your accounts. You may apply to the court for a passing of accounts as well, for several reasons, including questions regarding the amount of compensation that you are permitted to take. In an application for the passing of your accounts, the court may grant or adjust your compensation and temporarily suspend or even permanently terminate your guardianship, depending on the outcome.

It is therefore extremely important that you maintain your records and accounts in a manner outlined below. (See Ontario Regulation 100/96).

Records and Accounts - What is Required

In addition to the accounts, you MUST keep your certificate of statutory guardianship or the court order that appointed you as the guardian, a copy of the management plan and a copy of any court orders that relate to management of the incapable person's property. It is your responsibility to keep the original copy of your certificate in a safe place and it is recommended that you NEVER give this certificate to anybody else to hold.

The records that you keep *must* include:

- A list of *all* of the incapable person's assets as of the date of the first time you make any transaction on the incapable person's behalf. Assets include real estate, money, securities, investments, motor vehicles and other personal property;

- An up-to-date list of all assets acquired and disposed of (bought, sold, loaned or given as a gift) on behalf of the incapable person. You must include the date and reason for acquiring or disposing of the property and the name of the person from or to whom the asset was acquired or disposed;

- An up-to-date list of all money that you pay out or receive on behalf of the incapable person, including all details associated with the transaction, i.e. the date, reason, information about the account you withdrew from or deposited into, and the person with whom you carried out the transaction;

- An up-to-date list of all investments made on behalf of the incapable person, including amount, date, interest rate and type of investment;

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- An up-to-date list of all of the incapable person's liabilities (debts) as of the date of your first transaction as guardian;

- An up-to-date list of all liabilities that you have paid off or taken on, if any, on behalf of the incapable person, including the date, the nature of the liability (to whom or for what does the person owe or no longer owe money) and the reason for its being discharged or incurred; and

- An up-to-date list of all compensation that you take, including the amount, date and method of calculation AND a list of the assets and the value of each asset used to calculate your management fee, if any.

It is also a good idea to keep copies of invoices and bills you have paid on the person's behalf, and cancelled cheques. You must retain the accounts and records until you no longer have guardianship over the property and one of the following occurs:

- another person is given the authority to manage the incapable person's property and you deliver the accounts and records to that person;
- the incapable person dies and you deliver the accounts and records to the person with legal responsibility for the estate;
- you are discharged from your duties by the court and the time for appealing the decision has expired or you are being discharged on appeal; or
- a court order directs you to destroy or dispose of the accounts and records;
- you are provided with a document called a release, relieving you of any further personal legal responsibility for your actions as a guardian, signed by the person, if they are now capable, or a legal representative of the person's estate, or a new guardian.

Maintaining Confidentiality

You are not allowed to disclose any information contained in the accounts and records unless required to do so in order to make transactions on the incapable person's behalf or otherwise fulfil your duties as a guardian, or if ordered to do so by a court.

You must produce copies of your records to:

- the incapable person;
- the incapable person's attorney for personal care or guardian of the person;
- the Public Guardian and Trustee.

Acting Under a Continuing Power of Attorney for Property

The duties and powers summarized in this information bulletin also apply to individuals managing the property of an incapable person using a power of attorney. However, if the power of attorney has specific directions in it, for example; about whether the attorney may be paid compensation, then the attorney must follow those specific directions.

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This information bulletin has been provided to help a person who has been appointed as a guardian of property of an incapable person. While it provides useful information about the role and responsibilities of a guardian of property, it is only a summary and it is not legal advice. If you have specific questions about your own situation, you should speak to a lawyer or an accountant to receive advice to guide you.

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